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Toh Kian Peng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-459–12 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
15 FEBRUARY 2018

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Criminal Law — Murder — Whether intention to kill present — Accused while committing robbery armed with knife stabbed victim during physical struggle causing her death — Whether accused could avail of defence of sudden fight resulting in accidental stabbing — Whether said defence rightly rejected by trial judge — Whether accused's defence did not bring his case under Exception 4 to s 300 of the Penal Code or excuse him under s 80 of the Penal Code

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The appellant ('Toh') was convicted and sentenced to death by the High Court for murdering the owner of a beauty salon ('Liew'). Toh had intended to rob the salon while armed with a knife and went there one morning with his girlfriend, PW8, on the pretext of wanting to get a facial treatment done. They were driven there by Toh's friend, PW13, who waited in the car outside the premises while Toh and PW8 were inside the salon. At the time, Liew and her assistant, PW12, were attending to a customer in a room in the salon when Toh and PW8 came to enquire about the price for a facial treatment. While Liew was attending to them at the front desk, PW12 continued attending to her customer in the room. A short while later, PW12 heard a verbal argument taking place at the front desk area and then someone screaming in pain. PW12 became frightened and locked the door of the room she was in and only came out when she did not hear any further commotion. When she came towards the front desk, PW12 saw Liew lying on the floor and a sheath of a knife was lying nearby. She did not see anyone else in the salon. By the time a doctor and police arrived at the scene, Liew had died. A post-mortem revealed that there were several injuries and stab wounds on Liew's body, including one which had severed a major blood vessel causing her to bleed to death. Both PW8 and PW13 became witnesses for the prosecution. PW8, who had witnessed the whole incident in the salon, absconded midway through her examination-in-chief at the trial and could not be located thereafter by police. PW13 testified that on the evening before the incident, Toh and PW8 came to meet him and during that meeting Toh told him of his plan to rob the beauty salon the following day and asked PW13 to drive them there. After taking them to the salon and while waiting in the car outside, PW8 signaled to him to come into the salon. At the time he entered the premises, PW13 saw Toh on top of Liew who was lying face down on the floor. PW13 said he also saw Toh stab

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Liew in the back with the knife. On Toh's instructions, PW13 grabbed cash, two cellphones and a laptop computer from the salon counter and rushed back to the car before being joined by Toh and PW8 and they then fled from the scene. Toh was arrested later that day by police when he had stopped at a petrol station to fill petrol. A blood-stained knife was found in the car he was driving. The blood on the knife and on the sheath found at the scene of the crime matched Liew's DNA. Toh's defence at the trial was that he had only intended to rob the beauty salon and not to kill Liew. He said Liew's death was an accident which happened while he was struggling with her and she fell onto the knife. The trial judge ruled that based on the circumstances and facts of the case, Toh could not avail of the defence of sudden fight resulting in accidental stabbing. In his instant appeal against the conviction and sentence, Toh argued that: (a) the trial judge had not properly evaluated his defence to find that he had no pre-meditation to kill Liew and that his case should fall under Exception 4 to s 300 of the Penal Code; and (b) the prosecution's failure to offer PW8 as a witness to the defence had fatally prejudiced him.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The record showed that the trial judge had sufficiently considered Toh's defences of sudden fight and lack of intention/premeditation to cause death albeit under a different provision of the law, ie, s 80 of the Penal Code which carried similar effect as the provision contained under Exception 4 to s 300 of the Penal Code. On a careful consideration of all the evidence, the trial judge was right in rejecting Toh's defence and convicting him on the charge (see paras 36, 38 & 41).

(2) As to Toh's complaint that he was prejudiced by the prosecution's failure to produce PW8 or offer her to the defence, it was not disputed that PW8 had absconded and could not be traced by police. Her evidence until the time she absconded was neutral. If she had given further testimony, it could have supported either the prosecution's case or the appellant's. Therefore, the court could not agree with Toh's assertion that PW8's absence had prejudiced him (see paras 39–40).

[Bahasa Malaysia summary

Perayu ('Toh') telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh pemilik salon kecantikan ('Liew'). Toh berniat untuk merompak salon berkenaan dengan bersenjatakan pisau dan pergi ke sana pada suatu pagi bersama-sama dengan teman wanita Toh, PW8, yang berpura-pura untuk mendapatkan rawatan kecantikan. Mereka dibawa oleh rakan Toh, PW13, yang menunggu di dalam kereta di luar premis ketika Toh dan PW8 berada di salon. Ketika kejadian, Liew dan pembantunya, PW12, sedang melayan pelanggan di dalam bilik di salon tersebut ketika Toh dan PW8 datang bertanyakan harga rawatan kecantikan wajah. Ketika Liew

melayan mereka di meja hadapan, PW12 sedang melayan pelanggan di dalam bilik. Tidak berapa lama kemudian, PW12 mendengar pertengkaran berlaku di kawasan meja hadapan dan kemudianya mendengar orang menjerit kesakitan. PW12 menjadi takut dan mengunci pintu bilik dia berada dan hanya keluar apabila tidak lagi mendengar kekecohan berlaku. Ketika dia menghampiri meja hadapan, PW12 melihat Liew terbaring di lantai dan sarung pisau berdekatan. Dia tidak melihat ada sesiapa di dalam salon. Belum sempat doktor dan polis tiba di tempat kejadian, Liew telah meninggal dunia. Pembedahan bedah siasat mendapati terdapat beberapa kecederaan dan kesan tikaman pada badan Liew, termasuklah satu kecederaan parah pada saluran darah utama yang menyebabkan beliau meninggal akibat kehilangan darah. Kedua-dua PW8 dan PW13 menjadi saksi pendakwaan. PW8, yang menyaksikan kejadian tersebut di salon, telah melarikan ketika pemeriksaan balas berjalan dan tidak berjaya dikesan oleh pihak polis sejak dari itu. PW13 memberikan keterangan bahawa pada petang sebelum hari kejadian, Toh dan PW8 datang berjumpa dengan beliau dan ketika perjumpaan tersebut Toh telah memberitahu kepada beliau rancangan untuk merompak salon kecantikan pada hari berikutnya dan meminta PW13 memandu mereka ke sana. Setelah membawa mereka ke salon dan menunggu di dalam kereta di luar, PW8 memberikan isyarat untuk beliau datang ke salon. Ketika memasuki premis tersebut, PW13 melihat Toh di atas Liew yang terbaring sambil muka menghadap ke lantai. PW13 menyatakan bahawa dia juga melihat Toh menikam belakang Liew dengan pisau. Atas arahan Toh, PW13 mengambil wang tunai, dua telefon bimbit dan sebuah komputer laptop dari kaunter salon dan bergegas kembali ke kereta sebelum disertai oleh Toh dan PW8 dan mereka lari dari tempat kejadian. Toh ditangkap pada hari yang sama oleh pihak polis ketika dia berhenti untuk mengisi minyak di stesen minyak. Pisau berlumpuran darah ditemui di dalam kereta yang beliau naiki. Darah pada pisau dan sarung yang ditemui di tempat kejadian padan dengan DNA milik Liew. Pembelaan Toh di peringkat perbicaraan adalah beliau hanya berniat untuk merompak salon kecantikan tersebut dan bukannya untuk membunuh Liew. Beliau menyatakan bahawa kematian Liew adalah tidak disengajakan kerana beliau sedang bergelut dengan Liew dan beliau jatuh ke arah pisau. Hakim bicara memutuskan berdasarkan keadaan dan fakta-fakta kes, Toh tidak akan berjaya dengan pembelaannya iaitu pertengkaran yang membawa kepada penikaman secara tidak sengaja. Dalam rayuan terhadap sabit kesalahan dan hukaman, Toh menghujahkan bahawa: (a) hakim bicara tidak menilai sepenuhnya pembelaan beliau dalam memastikan bahawa beliau tidak mempunyai pra-meditasi untuk membunuh Liew dan kes beliau seharusnya diputuskan di bawah Pengecualian 4 kepada s 300 Kanun Keseksaan; dan (b) pihak pembelaan gagal untuk menawarkan PW8 sebagai saksi pembelaan adalah sangat prejudis terhadap beliau.

Diputuskan, secara sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

A (1) Rekod menunjukkan bahawa hakim bicara telah secukupnya mempertimbangkan pembelaan Toh terhadap pertengkaran dan ketiadaan niat/pra meditasi yang menyebabkan kematian walaupun di bawah peruntukan undang-undang yang lain, iaitu, s 80 Kanun Keseksaan yang membawa kepada kesan yang sama di bawah peruntukan
B yang terkandung di bawah Pengecualian 4 s 300 Kanun Keseksaan. Dalam penelitian yang jelas terhadap kesemua bukti dan keterangan, hakim bicara telah dengan tepat menolak pembelaan Toh dan menyabitkan kesalahan terhadap pertuduhan (lihat perenggan 36, 38 & 41).

C (2) Merujuk kepada aduan Toh bahawa beliau telah diprejudiskan oleh kegagalan pendakwaan untuk membawa PW8 atau menawarkan beliau kepada pihak pembelaan, ianya adalah tidak dipertikaikan bahawa PW8 telah lari dan tidak dapat dikesan oleh pihak polis. Keterangan beliau
D sepanjang perbicaraan adalah bersifat neutral. Sekiranya dia memberikan keterangan, maka ianya sama ada boleh memberi sokongan kepada kes pendakwaan dan juga pembelaan. Maka, mahkamah tidak bersetuju dengan hujahan Toh bahawa ketiadaan PW8 adalah prejudis terhadap beliau. (lihat perenggan 39–40).]

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Notes

For cases on whether intention to kill present, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1992–1993.

F **Cases referred to**

Mohamed Kunjo v Public Prosecutor [1978] 1 MLJ 51, PC (refd)
Mohd Azuwa Talib v Public Prosecutor [2014] 1 LNS 861, CA (refd)

G **Legislation referred to**

Criminal Procedure Code ss 113, 402B
Penal Code ss 80, 300, 302

Appeal from: Criminal Trial No 45B-05–03 of 2014 (High Court, Johor
H Bahru)

Anita Vijaya Rajah (Mariammah with her) (Gan & Zul) for the appellant.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

I

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Toh Kian Peng, was charged at the Johor Bahru High Court with an offence of murder in contravention of s 302 of the Penal Code ('the PC'). The charge reads:

> Bahawa kamu pada 17 Ogos 2013 jam lebih kurang 11.30 pagi, bertempat di Pusat Kecantikan Cinderella Beauty Centre, No 25, Jalan Indah 1/1, Taman Bukit Indah, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Liew Oi Mei (No K/P: 740917-08-5442) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] At the end of the case for the prosecution, the learned High Court judge ('learned trial judge') was satisfied that the prosecution had established a prima facie case against the appellant and ordered the appellant to enter his defence on the charge preferred.

[3] After a full trial, the appellant was found guilty, convicted and sentenced to suffer the mandatory death penalty.

[4] Aggrieved, the appellant appealed to this court against his conviction and sentence. We heard the appeal on 23 January 2018 and we dismissed the appellant's appeal. We now give our reasons.

THE FACTS

[5] This is one of the many other cases which started as a robbery but ended with the death of the deceased, Liew Oi Mei, the owner of a beauty saloon known as Cinderella Beauty Centre. The factual matrix of this case was well encapsulated in the learned trial judge's grounds which is not necessary for us to recapitulate them except for the relevant fact for the disposal of this appeal.

[6] The prosecution's case anchored on the evidence of three main witnesses in the persons of Khoo Wen Quen (PW12), Ang Zhi Yi (PW8) and Lim Kok Hwa (PW13). PW12 was a trainee beautician at the beauty parlour where the deceased was her employer. According to PW12, on 17 August 2013 she had an appointment with her customer at 10am, however her customer only turned up 11.15am. When the customer came, she started the facial treatment in the third room.

[7] As PW12 and the deceased was in the midst of cleaning up the customer, someone had pressed the doorbell. PW12 then opened the door and went out

from the third room. A man, later identified by PW12 as the appellant, asked PW12 the cost of the facial treatment and PW12 replied that it is RM68 per session. PW12 noticed that the appellant came with a lady, she later identified as PW8.

[8] The appellant then had asked to see PW12's employer ie the deceased. PW12 told the deceased that someone had wanted to see her at the front desk. The deceased then went out to meet the appellant. PW12 saw the appellant talking with the deceased and after that PW12 continued with the treatment to her customer in the third room.

[9] About five minutes later, PW12 heard a scream of someone in pain and she also heard the appellant spoke loudly with the deceased but PW12 could not understand what was being said. PW12 became frightened when she heard a loud scream of the deceased and she locked the door and continued the treatment on her customer until she heard nothing and everything became silence. PW12 went out from the third room and saw the deceased was lying on the floor and she did not see anyone else.

[10] PW12 then asked her customer for help to call for an ambulance and the police while PW12 herself called her mother. At that time, PW12 found that the deceased was still alive. When PW12's mother arrived at the beauty parlour, PW12 tried to find any doctor at the nearby clinic. The doctor came and upon examining the deceased, the doctor confirmed that the deceased had passed away. PW12 saw a sheath (exh P21H(2)) on the floor at the beauty parlour which did not belonged to them and she had never seen the sheath before.

[11] Meanwhile, PW13, a friend of the appellant, testified that on the day in question he went to the beauty parlour together with the appellant and PW8, the girlfriend of the appellant. Prior to that incident, the appellant told PW13 that the appellant wanted to rob the beauty parlour. The appellant wanted to borrow PW13's car for him to go to the beauty parlour, however PW13 refused to lend his car and instead decided to send the appellant and PW8 to the beauty parlour at Taman Bukit Indah, Nusa Bistari.

[12] PW13 further testified that upon reaching the beauty parlour area, the appellant and PW8 alighted from his car while he remained in the car. PW13 parked the car a distance away from the beauty parlour at about 30 feet away. A minute later, PW13 saw PW8 came out from the beauty parlour and calling him to go to the beauty parlour. PW13 came out from the car and entered the beauty parlour. When PW13 entered the beauty parlour, he saw the deceased lying on the floor with her facing downwards while the appellant was in a lying prone position with the face facing downwards on the deceased's body.

[13] The appellant then handed over a knife (exh P21H(1)) to PW13 and PW13 threw it away spontaneously as he could see the women was lying on the floor. The appellant told PW13 that he only wanted to rob the lady but never intended to kill the deceased. PW13 then pulled the deceased to the spot marked as '2' in photograph No 20 (exh P6(20)). When PW13 did that, suddenly the appellant took the knife back and stabbed the deceased on the back.

[14] The appellant then instructed PW13 to go to the counter to get any valuable items. PW13 then took away some cash, two hand phones and a computer and left the beauty parlour hurriedly while the appellant was still inside the beauty parlour. Later PW13 saw the appellant came out from the beauty parlour and entered his car. After that PW13 drove the car and fled from the scene.

[15] PW8 testified that on 17 August 2013, she followed the appellant to a beauty parlour at Taman Bukit Indah to do a facial treatment. They went in PW13's car. However, on the said day she did not do her facial. She confirmed that she had given a statement under s 113 of the Criminal Procedure Code ('the CPC') to the police. However, in the midst of the examination-in-chief, PW8 did not turn up in court and could not be located.

[16] The autopsy on the deceased's body was carried out by Dr Khairul Anuar bin Zainun (PW11), a forensic pathology consultant at the Sultanah Tengku Tun Aminah Hospital, Johor Bahru. According to the witness, there were 20 marks of injuries, which he had mentioned in his post-mortem report (exh P43). In his summary and conclusion of his post-mortem report, PW11 stated that the deceased sustained blunt type injuries to her head, face and both upper limbs as well as multiple stab wounds to her abdomen, back of neck and left upper back. One of the two wounds to the abdomen penetrated major blood vessel with the resultant severe blood exsanguinations (the process of blood loss, to a degree sufficient to cause death). This wound was fatal in nature.

[17] PW11 also testified that some of the injuries were described as 'defensive wounds'. The overall pattern of injuries sustained was neither incidental nor self-inflicted. There was no significant natural disease that could have or contributed to her death at that particular time. PW11, in his opinion, classified the cause of death of the deceased was due to stab wound to the abdomen.

[18] The appellant was arrested by ASP Mataran a/l Muniandi (PW7) and his team on the same day (ie 17 August 2013) at around 5.15pm at a Mobil Petrol Station, Main Road, Pekan Nenas, Johor. At the time of arrest, the

A appellant was driving a Citra Naza car bearing registration No MBQ 9955 ('the said car'). Under the footrest of the rear left passenger seat of the said car, PW7 recovered a bloodstained knife (exh P21H(1)) without the sheath. The chemist, Nur Hafiza bt Md Yusof (PW6) confirmed upon analysis that the blood stain indicated on the knife and the sheath recovered from the scene of the crime, was consistent with the deceased's DNA.

[19] After subjecting the prosecution's evidence to a maximum evaluation, the learned trial judge was satisfied that the prosecution had succeeded in proving all the ingredients of the charge under s 302 of the Penal Code and in the same vein has succeeded in proving a prima facie case against the appellant. Thus, the appellant was called to enter his defence on the charge preferred.

THE DEFENCE

[20] The appellant elected to give evidence under oath. The appellant is the sole witness for the defence. The evidence of the appellant was given by way of a witness statement read by him in court pursuant to s 402B of the CPC, marked as 'PSSDI'. The evidence of the appellant had been narrated by the learned trial judge in his grounds at pp 26–31 of the appeal record Vol 1. We reproduce the narrative of the defence's case with certain modification, as follows.

[21] The evidence by the appellant were that a day before the incident on 16 August 2013, the appellant together with his girlfriend, Ang Zhi Yi (PW8), had gone to PW13 place at Taman Tampoi Indah at about 8pm. Its purpose was to hang around and to take drug with PW13. While he and PW13 were taking drug, he informed PW13 that he needed money and had told PW13 that he had earmarked a beauty parlour at Bukit Indah and his plan was to rob the beauty parlour. On the morning of 17 August 2013, he told PW13 that he and PW8 will go to the beauty parlour at about 9am to see the proprietor of the beauty parlour namely the deceased to enquire the cost of the facial treatment. The deceased said that the cost of the facial treatment was about RM68. The deceased then told him to come back the next day as the deceased could not perform the facial treatment on the same day. However, the appellant said he told the deceased that he was not free to come for facial treatment the following day. Although he had paid the sum of RM68 to the deceased but still he had to come the next day. The appellant and PW8 later left the beauty parlour and went to the town area. The appellant told PW13 to follow as he wanted to rob the beauty parlour. The appellant and PW8 then went home after finishing taking the drug.

[22] Later, on the same day, the appellant and PW8 went back to PW13's place and upon arrival thereat, the appellant took drug. The appellant then

persuaded PW13 to come along and robbed the beauty parlour. Thereafter the appellant, PW8 and PW13 proceeded to the beauty parlour in a car namely Naza Citra with registration No MBQ 9955 driven by PW13 towards Bukit Indah. Upon arrival at Bukit Indah at about 10.45am, PW13 drove the car round and round the vicinity and finally parked the car in front of the beauty parlour. The appellant and PW8 got out of the car and walked towards the beauty parlour while PW13 waited in the car. The appellant carried with him a knife in a black bag. The appellant then pressed the doorbell of the beauty parlour and a Chinese lady, namely PW12 opened the door and the appellant and PW8 entered the beauty parlour. It was later known that PW12 work at the beauty parlour. The appellant then asked PW8 the cost of facial treatment and PW8 replied RM68. The appellant then asked PW12 to call the deceased as he wanted to talk to the deceased. PW8 then went to call the deceased. The deceased came out and met with the appellant in front of the counter. PW12 then continued with the job in one of the rooms. The appellant told the deceased that he wanted to have facial treatment but was told by the deceased that it was not possible.

[23] The appellant further said that when the deceased told him that it was not possible for him to have a facial treatment, he then asked for a refund of the payment made but the deceased said it could not be done as the said amount had been accounted for in the financial account. Upon hearing this, he became enraged and took out his knife from the black bag and showed to the deceased and shouted at her to refund his money. The deceased upon seeing the said knife attempted to wrench the knife from his hand. He was startled by the said action of the deceased and a struggle ensued between him and the deceased.

[24] Before the struggle, both he and the deceased were standing between the door and where the counter was which was near to the wall. The struggle happened between the door and the counter near the wall. In the course of the struggle, he had knocked the deceased's head several times against the wall and had also punched and stabbed the deceased several times on the rear part of the deceased's body in order to extricate himself but was not successful. The appellant said the deceased had also scratched his face and his hand. In the ensuing struggle, his right side of his body and the deceased's hand were injured by the knife. He could not remember how many times he was injured by the knife as at the material time his prime concern was to extricate himself from the deceased.

[25] In the ensuing struggle, the deceased seem to have fallen but before the deceased fell down, she had grabbed him and he fell onto the deceased's body and the knife that was held by him was pointing towards the deceased. The appellant said when he fell down on the deceased's, the knife could have accidentally embedded into the deceased' body. He and the deceased tried to

A get up but had fell again and the knife he was holding was still pointing towards the deceased. He was of the view when he fell down for the second time, he might have stabbed the deceased again.

B **[26]** He then pushed the deceased aside towards the wall in order to free himself and in doing so he had pressed the deceased by sitting next to her while leaning himself towards the deceased's body in order to prevent the deceased from moving.

C **[27]** The appellant said in the early part of the wrench, PW8 was in the beauty parlour. When the deceased attempted to wrench the knife from him, PW8 screamed, presumably she was startled. The appellant said after that he could not recall what happen to PW8. All he could recall was when he was pressing against the body of the deceased in a sitting position next to the D deceased, PW13 entered the beauty parlour and PW13 seemed surprise to see him and the deceased. PW13 then took away the knife from his hand and shove the knife near the counter. PW13 then dragged the deceased towards the rear of the beauty parlour as PW13 did not want anyone outside to see what had happened inside. The appellant said he saw the deceased as if she wanted to E scream again and instantaneously took the knife and stabbed the deceased back once more.

[28] PW13 then went to the counter and took cash from the cash register and carted away several movable items at the counter before making an escape F by bringing along the black bag and he followed from behind.

[29] The appellant said that he, PW13 and PW8 then made a move in a car driven by PW13 while he sat at the rear and PW8 sat at the front passenger seat next to PW13. When they arrived at PW13's place and before PW13 alighted G from the car, PW13 told him that PW13 took 2 handphones, one for himself and the other for him. The appellant said the knife he threw it in the car registration No MBQ 9955 and the sheath he accidently left at the beauty parlour.

H **[30]** In the afternoon of the incident while resting at PW8's place, PW13 called him and asked for his share of the robbery money. He told PW13 to wait until he had disposed of the laptop taken from the beauty parlour. He did not have the opportunity to dispose of the laptop as on the same day of the incident at about 6pm while he was filling up petrol at a Mobil petrol station at Pekan I Nenas, he was arrested by the police. The appellant said that he too had suffered injuries to several parts of his body namely his right body was injured by the knife and bloodstains could be seen on the jeans he was wearing. Finally, the appellant stated that the purpose of going to the beauty parlour was to rob and had no intention of causing the deceased's death.

[31] In the nutshell, the defence raised by the appellant is one of sudden fight. According to him, the stabbing was accidental and it was never his intention to kill the deceased, but only to rob the deceased's beauty parlour.

[32] After considering the entire and in totality the evidence of the defence in the light of the evidence adduced by the prosecution, the learned trial judge found the appellant guilty and convicted him on the charge as preferred. In other words, the appellant's defence of sudden fight and an accidental stabbing in the ensuring struggle while committing a robbery had been outrightly rejected by the learned trial judge.

THE APPEAL

[33] Before us, learned counsel for appellant raised the following three issues as grounds of appeal:

(a) that the learned trial judge erred in law and fact for not considering that this case should fall under Exception 4 to s 300 of the Penal Code, based on the appellant's cautioned statement (exh D45) in that the offence was committed without pre-meditation;

(b) that the learned trial judge erred in law and fact when His Lordship did not evaluate the defence of sudden fight raised by the appellant; and

(c) failure of the prosecution to offer PW8 as a witness at the end of the prosecution's case.

OUR DELIBERATION AND DECISION

[34] Learned counsel submitted that the appellant cannot be convicted for an offence of murder under s 302 of the Penal Code as the appellant had no intention to kill the deceased. It was argued that it was not a case of premeditated murder. It was further argued that the act of the appellant in stabbing the deceased was committed as a result of sudden fight while committing a robbery, thus the act of the appellant would fall under Exception 4 to s 300 of the Penal Code.

[35] In reply, learned deputy public prosecutor submitted that based on the facts and circumstances of this case, Exception 4 to s 300 of the Penal Code shall not apply as correctly decided by the learned trial judge. The learned trial judge had decided that the defence of sudden fight raised by the appellant was not available to the appellant in the circumstances of this case. Exception 4 to s 300 of the Penal Code reads as follows:

> Exception A — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and

without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

[36] We had the opportunity to peruse the appeal records and with respect we disagreed with learned counsel's complaints that the two issues regarding intention/premeditation and sudden fight were not duly considered by the learned trial judge. We note that His Lordship had in his grounds had sufficiently considered the two issues raised by learned defence counsel in his submission before us. The learned trial judge in his grounds had considered on the issue of sudden fight and lack on intention as the act was not pre-meditated albeit under a different provision of the law ie s 80 of the Penal Code, which carry similar effect as the provision contained under Exception 4 to s 300 of the Penal Code.

[37] At pp 31–35 of the appeal record Vol 1, His Lordship stated:

Premised on the stance of sudden fight which resulted in an accidental stabbing which is one of the excepted defence as stipulated in Section 80 of the Penal Code to a charge under Section 302 of the Penal Code. Section 80 of the Penal Code states as follows:

> 80 Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge, in doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

If the accused succeed in his defence of accidental stabbing arising out a sudden fight it is a complete defence and an outright acquittal unlike a defence of grave and sudden provocation to a murder charge as if successful would only reduce the offence of murder to one of culpable homicide not amounting to murder. However it would not entitle the accused to an outright acquittal.

In dealing with the defence of accidental stabbing as in the instant case, the Court would have to consider it in the light of Section 105 of the Evidence Act 1950 which states as follows:

> 105 When a person is accused of any offence, the burden of proving the existence of the general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

To earn an acquittal, the accused must prove by admissible evidence that the stabbing was in fact an accident. In other (sic) words the Court shall presume the absence of those circumstances. In the instant case the onus was on the accused to prove that the stabbing was an accident. In attempting to prove that it was an accident, the accused need only prove it by discharging the burden of proof that of a civil burden of proof which would be lighter than the proof beyond reasonable

doubt but heavier than to merely a reasonable doubt in the prosecution case.

In unveiling its defence the accused testified that the sudden fight ensued when the deceased tried to wrench the knife held by the accused and in that process both the accused and the deceased fell and at the critical moment the knife held by the accused was pointed towards the deceased and when both fell the knife had accidentally embedded into the deceased body. The evidence given on oath had been stated by the accused in his cautioned statement tendered and marked as D45. It is imperative for the Court to consider the cautioned statement of the accused as part of the evidence of the defence and in this respect the court perused the contents of the cautioned statement and found it in material parts mirrored the evidence of the accused given under oath.

In gist what the learned counsel for the accused in his submission submit was that the injuries which were inflicted on the deceased which led to the deceased's death was as a result of an accidental stabbing in the ensuring struggle which took place in a commission of a robbery at the deceased's beauty parlour. The issue of the accused stabbing the deceased was not an issue in the case but rather the stabbing was accidental due to sudden fight ensued in a course of committing a robbery.

It is to be noted that the defence of accidental stabbing is not open to any accident or misfortune that entitles the accused to the benefit of the defence under Section 80 of the Penal Code. It must necessarily referred to the accused doing a lawful act in a lawful manner, with proper care and caution at the time of the accident or misfortune. The illustration to Section 80 demonstrate how an accident or misfortune that the law excuses the accused. The illustration is as follows:

> A is at work with a hatchet, the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part A, his act is excusable and not an offence.

On the facts of the case, there was nothing accidental about the stabbing. What the facts revealed clearly was an intentional act of stabbing as the accused had pointed the edge of the knife towards the deceased. The accidental stabbing could not be considered as doing any lawful act in a lawful manner by lawful means and with proper care and caution. It was a robbery in broad daylight and committing an armed robbery cannot possibly be considered as doing a lawful act unlike the illustration of the hatchet man to Section 80 of the Penal Code. The accused therefore could not on the primary facts benefit from the defence of accidental stabbing of the deceased in the course of committing a robbery.

The Court have analysed the medical evidence of the pathologist where there were 20 marks of injuries on the deceased of which the stab wounds were found No: 14, 15, 16, 17, 18, 19 and 20 as stated in the post-mortem report marked as P43. The pathologist found that the cause of death was the stab wound to the abdomen as found in injuries No: 14 and 15 which was fatal in nature. The evidence was also led that prior to the accused leaving the beauty parlour, the accused had struck a stab at the back of the deceased. The query here why the accused had to stab the deceased when the deceased was already critically wounded. The prosecution had proved that the DNA of the deceased was found on the blade of the knife P21H(1) used by the accused.

A The Court was of the view that in commission of a robbery the accused must anticipate that there will be resistance from the victim who has the legal right in law to protect her life and property. It should also borne in mind that if a knife was used in the commission of a robbery, there was a likelihood that if knife was used it was used with the intention of causing bodily injury to the deceased and that the bodily
B injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The Court has seen the knife use in the commission of the robbery in the instant case and found it very lethal with a sharp edge and blade which could easily have caused serious bodily injury if stab onto the deceased.

The Court in this respect after careful analysis of the evidence in totality found that
C the accused had intended to use the knife on the deceased in the course of committing a robbery. There was no evidence that a sudden fight had occurred but what the Court found was that the deceased was resisting a robbery in progress and in the ensued process the accused had knife to stab the deceased on the abdomen and the evidence of the second stab on the back of the deceased showed that the
D accused had wanted to further bodily injury to the deceased.

The accused must realised that he cannot expect the deceased to easily give way to an act of robbery without expecting that the deceased would not put up a struggle. The accused must accept the consequence of his act that he had intended to cause bodily injury to the deceased in the course of the robbery. In the upshot the Court
E found that the defence of sudden fight resulting in accidental stabbing was not available to the accused in the circumstances of the case.

[38] We have considered carefully all the evidence on record and we agreed
F with the learned trial judge's reasons in rejecting the appellant's defence of sudden fight and without pre-meditation. As such, we found no merits in the first two grounds of appeal posited before us by the learned defence counsel (see *Mohamed Kunjo v Public Prosecutor* [1978] 1 MLJ 51 and *Mohd Azuwa Talib v Public Prosecutor* [2014] 1 LNS 861).

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[39] Now we come to the third ground of appeal. Learned counsel complained that the appellant had been prejudiced for the failure of the prosecution to produce or to made available or to offer PW8 to the defence. PW8 was an important witness who is an eye witness who saw the incident.
H PW8 did not completed her evidence.

[40] We observed from the record that PW8, the girlfriend of the appellant, was at the crime scene and had watched the incident. It is not disputed that PW8 had absconded and could not be trace by the police. The evidence of
I PW8 thus far before she absconded as we have alluded to earlier are quiet neutral. Her further evidence, if she is available, can either lend support to the prosecution as well as to the appellant. We disagree with the learned defence counsel's complaint that the appellant was prejudiced in the absence of PW8.

CONCLUSION

[41] Based on the above, we find no merit in the appellant's appeal. The conviction is safe. The appeal is dismissed. The conviction and sentence of the High Court is affirmed.

Appeal unanimously dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar